90-1856

(1)

No.

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OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1990

R.J.C.R. - - - - - - - - - - Petitioner

versus

J.C.J.D. - - - - - - - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

GEORGE F. RABE
Counsel of Record
1004 First National Building
Main & Upper Streets
Lexington, Kentucky 40507-1708
(606) 255-2313

JAMES D. LAWSON
Executive Secretary
Judicial Retirement and Removal Commission
P.O. Box 21868
Lexington, Kentucky 40522-1868
(606) 269-1476

Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED FOR REVIEW

1. Whether Canon 7B(1) of Kentucky's Code of Judicial Conduct restricting campaign statements of candidates for elective judicial office is unconstitutional as denying free speech on its face or as applied in this case.

2. Whether application of Canons 1 and 2 of Kentucky's Code of Judicial Conduct to campaign statements of Respondent in this case is an unconstitutional denial of free speech.

LIST OF PARTIES

The Petitioner is Judicial Retirement and Removal Commission of Kentucky. The Respondent is Justice Dan Jack Combs, a justice of Kentucky's Supreme Court. In the caption the Commission is designated as R.J.C.R. and Justice Combs is designated as J.C.J.D. Proceedings of the Commission are confidential under Kentucky law. Abbreviations of the names of the parties were scrambled and used as a caption to maintain confidentiality when the case was pending in Kentucky's Supreme Court. However, the Opinion of the special justices of the Kentucky Supreme Court for which review is sought was released publicly upon its entiry so that the identity of the parties, as reflected in the Opinion, has become public.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

OPINIONS BELOW

The Opinion of the Kentucky Supreme Court, attached hereto as Appendix "A", is reported as *J.C.J.D.* v. *R.J.C.R.*, Ky., 803 S.W.2d 953 (1991).

The Findings of Fact, Conclusions of Law and Final Order of the Judicial Retirement and Removal Commission from which the Appeal to the Kentucky Supreme Court was taken, attached hereto as Appendix "B", was entered on February 10, 1990. It is not reported in any publication.

JURISDICTION

The judgment of the Kentucky Supreme Court was entered on February 14, 1991. On May 13, 1991, time for filing Petition for Writ of Certiorari was extended to and including May 30, 1991. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS AND RULES

The First Amendment to the Constitution of the United States is involved insofar as it provides:

> Congress shall make no law . . . abridging the freedom of speech. . . .

The Fourteenth Amendment to the United States Constitution is involved insofar as it provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

Canons 1, 2 and 7B(1) of Kentucky's Code of Judicial Conduct, which is codified as Rule 4.300 of the Rules of the Supreme Court of Kentucky, are involved in the following pertinent parts:

RULE 4.300 CODE OF JUDICIAL CONDUCT

Canon 1.

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2.

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

* * *

CANON 7.

A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO HIS JUDICIAL OFFICE

* * *

B. Campaign Conduct.

(1) A candidate, including an incumbent judge for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, . . . [and]

* * *

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] announce his views on disputed legal or political issues. . . .

STATEMENT OF THE CASE

In this proceeding, the Kentucky Judicial Retirement and Removal Commission (hereafter Commission) has found Respondent Justice Dan Jack Combs[1] guilty of six charges relating to public statements he made and campaign ads he placed in his quest for election as Kentucky Supreme Court Jutsice. The Commission ordered that he be suspended from his office without pay for a period of three months.[2] Justice Combs appealed to the Kentucky

[1]Justice Combs was a judge of the Court of Appeals when the campaign events occurred. Having been elected to the Supreme Court in the subject election, he will be referred to herein as Justice Combs.

[2]Transcript of Commission Record, hereafter TR, pages 230-252; Appendix B hereto.

Supreme Court which reversed on free speech grounds. Appendix A hereto.

The facts of Justice Combs' candidacy and the campaign statements and ads were stipulated in writing at the outset of the hearing before the Commission.[3]

Justice Combs, at the time a judge of the Court of Appeals of Kentucky, was a candidate for Justice of the Kentucky Supreme Court in the Seventh Judicial District in eastern Kentucky in the primary election held May 24, 1988, and in the general election held November 8, 1988. He finished second in the primary and won the general election runoff by 17,500 votes (TH 119).

Statements Related to the Primary Election in May 1988

During the May primary, Justice Combs made statements to newspaper reporters[4] presenting publicly his views:

—that the standard for court review of workers' compensation cases is unconstitutionally strict;

—that the "Firemen's Rule" deprives firefighters and law enforcement officers injured on the job of a remedy by due course of law; and

—that the law which denies handguns to convicted felons is in opposition to the Constitution which gives all people the right to bear arms. (Appendix D)

Justice Combs also made public statements critical of the Code of Conduct, including the following:

---

[3]Transcript of hearing of July 27, 1989, hereafter TH, 10-17; Commission Exhibit 1; Appendix C hereto.

[4]The statements made during the primary were published in newspaper articles filed as Commission Stipulation Exhibits 1A through G. Excerpts from the articles are contained in Appendix D hereto.

> It (the code) is a self-proclaimed power that they have assumed, and it is not the law, contrary to what they may believe. I can well understand their concern of my alleged violation of the code. Court members don't want their laundry viewed. They want to keep it in the closet, out of the view of the citizenry. I'm trying to bring it into the light.
>
> * * *
>
> This so-called code permits courts to get away with things like the firemen's rule and to keep it away from the public.

Justice Combs also stated that he had sworn

> to support and defend the Constitution and the Constitution does not swear us to do what judges tell us to do.

He also stated that he had sworn to support the state Constitution, not an election code. (Appendix D)

Justice Combs also accused his opponent of favoring the powerful over working people, stated that the Kentucky Supreme Court denied victims of wrongs access to the courts in various ways, criticized state courts in general for failing to abide by the wording of the laws and the Constitution, and challenged his opponent to a televised debate. One newspaper article noted:

> "Some of these judges says it's our duty to interpret," Combs said. "I say that's a bunch of crap."

These statements appeared in newspaper articles published in three newspapers circulated in the Seventh Judicial District: The Louisville Courier Journal editions of May 16, May 18, and May 26, 1988, the Lexington Herald Leader editions of May 19 and May 25, 1988, and the Williamson Daily News (Williamson, West Virginia) editions

of May 21 and May 23, 1988 (Commission Exhibit 1A through G; Appendices C and D hereto).

Justice Combs' Appearance Before the Commission in August 1988

Justice Combs appeared before the Commission in August, 1988 regarding a complaint about these statements; in response to a member's suggestion that persistence in such conduct during the November general election might justify his removal from office, Justice Combs replied that a federal court would have to decide that issue (TH 36-40, 107-109; Combs Exhibits 1, 3).

Ads Placed From November 2 to November 8, 1988

Eleven weeks after his meeting with the Commission regarding his tactics in the primary, in the last week of the general election campaign, Justice Combs' election committee bought ads in newspapers circulated in his district which contained the following statements. One ad contained the statement:

> Judge Combs's record shows beyond doubt that he holds the rights of the individual to be more important than the interests of the state, companies, or institutions/agencies. (Commission Exhibit 1H)

Another contained the statement that he "has demonstrated a better understanding of constitutional law and a higher regard for the rights of individuals." (Commission Exhibit 1I) A third ad which contained letters of endorsement from two unions stated in its body that those organizations:

> know that it is crucial that Kentuckians elect a Supreme Court Justice with a solid record as a friend of

> the working men and women of our great Commonwealth. (Commission Exhibit 1J)

These ads appeared in twelve newspapers circulated in the Seventh Judicial District beginning on November 2 and ending on November 8, 1988, the day of the general election (Commission Exhibit 1: H, I and J).

Justice Combs admitted that publication of his views in the articles and in the ads was a part of his campaign strategy to gain votes in the election (TH 86, 87, 102-104, 118, 119).

Records of the Kentucky Registry of Election Finance reflect that Justice Combs waged a widespread media campaign (TH 82; Commission Exhibit 2). As noted above, his tactics were successful and he converted his second place status in the primary to a 17,500 majority in the general election.

How Federal Question is Presented

The contention that the canons, or application thereof, violated the First Amendment guaranty of free speech was the core issue throughout the Kentucky proceedings. It was argued in motions to dismiss, response and briefs before the Commission (TR 24-48, 61-93, 141-159) and rejected by it (TR 235, 236; Appendix B hereto, pp. 17a, 18a). It was argued in briefs (Brief for Justice Combs, pp. 32-50; Brief for Commission pp. 28-43) before the Supreme Court of Kentucky and was sustained by that court (Appendix A hereto).

REASONS FOR GRANTING THE WRIT

1. The Special Kentucky Supreme Court[5] Has Applied the Free Speech Clause to Judicial Elections In a Way That Conflicts with Other State Courts of Last Resort and Federal Courts.

The Court below ruled that Canon 7B(1) of Kentucky's Code of Judicial Conduct was unconstitutional under the First Amendment because it was not narrowly drawn. *J.C.J.D.* v. *R.J.C.R.*, Ky., 803 S.W.2d 953 at 955 (1991). In addition, it ruled that the basis for application of Canons 1 and 2 of the Code to the campaign conduct in this case also centered on speech which fell within constitutional protections. 803 S.W.2d at 957.[6]

There is a clear conflict between the decision of the Kentucky Supreme Court and decisions of other state courts and federal courts. The most direct attack and holding regarding Canon 7B(1) is contained in a district court case in which the court upheld Ohio's identical Canon against constitutional challenges based on free speech. *Berger* v. *Supreme Court of Ohio*, 598 F.Supp. 69 (SD Ohio, 1984). In *In Re Kaiser*, 111 Wash. 275, 759 P.2d 392 (1988), the court upheld against constitutional challenges the same provisions of Canon 7B(1)(c) involved in this case to censor a judge for a campaign letter stating that the judge is "TOUGHEST ON DRUNK DRIVING" and "TOUGH ON DRUNK DRIVING." That decision of the

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[5]The elected justices of the Kentucky Supreme Court recused themselves and special justices were appointed for this case.

[6]The Commission's finding of "misconduct in office" in violation of Supreme Court Rule 4.020(1)(b)(i) was based on deliberate violations of the canons. The "misconduct" rule itself is not at issue as its application in this case depends on the constitutionality of the campaign canons on their face and as applied in this case.

Supreme Court of Washington conflicts with the decision of the court below invalidating Kentucky's canon of its face and denying its application to such campaign positions as those that firefighters and law enforcement officers injured on the job are being deprived of a remedy by the existing court, that the candidate is a friend of working men and women, and that his record shows beyond doubt that he holds the rights of the individual to be more important than the interests of the state, companies or institutions. In *Morial* v. *Judiciary Com'n of State of La.*, 565 F.2d 295 (5th Cir. 1977), cert. denied, 435 U.S. 1013, 56 L.Ed.2d 395, 98 S.Ct. 1887, the court upheld against First Amendment claims of free expression and association and Fourteenth Amendment claim of equal protection a Louisiana statute requiring that a state judge resign his office prior to becoming a candidate for non-judicial office. The court stated, 565 F.2d at 302:

> The government has at least as great an interest in assuring the impartiality of judicial administration of the laws as in assuring the impartiality of bureaucratic administration of the laws. *See U.S. Civil Service Comm'n* v. *Nat'l Ass'n of Letter Carriers,* 413 U.S. 548, 564-65, 93 S.Ct. 2880, 37 L.Ed.2d 796. As the Supreme Court has observed, the reality and the appearance of "political justice" are incompatible with the assumptions of a system of government of laws not men. *Id.*

Quoting in part from *Morial,* the Court in *Berger* v. *Supreme Court of Ohio, supra,* stated, 598 F. Supp. at 75, 76:

> Ours is an era in which members of the judiciary often are called upon to adjudicate cases squarely presenting hotly contested social or political issues. The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any

> interest, party, or person is entitled to the greatest respect.

Morial, 565 F. 2d at 302. Hence, the prohibitions against announcing predetermined views on disputed legal or political issues, and against making pledges of conduct other than those relating to the faithful and impartial performance of duties in office. The Court finds that plaintiff has not demonstrated a substantial likelihood that these interests are outweighed by whatever intrusion on the First Amendment is caused by prohibiting judicial candidates from making misleading or fallacious statements or political pledges.

> . . . . The very purpose of the judicial function makes inappropriate the same kind of particularized pledges and predetermined commitments that mark campaigns for legislative and executive office. A judge acts on individual cases, not broad programs.

The case of *In Re Seraphim,* 97 Wis. 2d 485, 294 N.W. 2d 485 (1980) cert. denied, 449 U.S. 994, 66 L.Ed.2d 291, 101 S.Ct. 531, did not involve the campaign canon. However, in rejecting overbreadth challenges to other broad canons of judicial conduct, the Court stated, 294 N.W. 2d at 494:

> While we agree with respondent that Rules 8, 11, 15 and 16 may proscribe some speech and conduct which, for other persons in other circumstances, could not be constitutionally proscribed, we do not accept his contention that they are unconstitutionally overbroad. . . . They are limitations made necessary by the very nature of the task which a judge seeks to perform. As such they are not improper.

It is apparent that these decisions are in conflict with the decision below that the prohibitions of the Code of Judicial Conduct, particularly Canon 7B(1), unconstitutionally infringe upon free speech.

2. The Court Below Has Decided an Important First Amendment Question Which Has Not Been, But Should Be, Settled By This Court, or Has Decided It In a Way That Conflicts With Applicable Decisions of This Court.

In 1990, the American Judicature Society completed a comprehensive Judicial Elections Project. It issued two publications which bear on the issues in this case. Electing Justice: The Law and Ethics of Judicial Election Campaigns, McFadden (AJS 1990), contains these statements in its Preface, page xiv:

> Advertising in judicial campaigns has grown progressively more negative. It is not just a matter of bloody daggers and empty electric chairs, images that surface occasionally in campaign literature and television spots. . . . Campaign literature has become increasingly misleading, distorting not only the records of opponents, but the nature of the judicial office and the decisions judges make.
>
> These developments are cause for deep concern. Judges play a role in our government different from other elected officials, a role often inconsistent with the high finance and hurly-burly of political campaigns. Conduct acceptable in ordinary political races for the statehouse may not be acceptable for candidates who are later charged with deciding impartially all cases that come before them.
>
> These unfortunate developments in judicial campaigns float on a sea of voter ignorance and apathy. . . .
>
> All of this raises an important problem for American democracy: how to achieve the electoral accountability of judges, while at the same time preserving the independence, impartiality and dignity of the winning candidates. The American Judicature Society estab-

> lished its Judicial Elections Project to address this problem. . . .

The companion publication, Electing Justice: A Handbook of Judicial Election Reforms, Mathias (AJS 1990), page 28, notes that two-thirds of the elective states follow the ABA Model Code of Judicial Conduct which, at least until the time of the project publication last year, contained the same language in Canon 7B(1)(c) as that in Kentucky's rule prohibiting pledges or promises of conduct in office and announcements of views on disputed legal or political issues. It lists 25 elective states as following the Code: Alaska, Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Washington, West Virginia, and Wyoming. *Id.* 70, N. 91. It is obvious that the First Amendment question involving that canon in this case is an important one which should be settled by this Court.

Furthermore, to the extent that this Court has addressed restrictions on political activities, we believe the decision below is in conflict with its decisions. In *CSC* v. *Letter Carriers,* 413 U.S. 548, 37 L.Ed. 2d 796, 93 S.Ct. 2880 (1973), and *Broadrick* v. *Oklahoma,* 413 U.S. 601, 37 L.Ed. 2d 830, 93 S.Ct. 2908 (1973), this Court rejected constitutional challenges based on free speech, vagueness, overbreadth, and equal protection, to political restrictions imposed on federal employees and Oklahoma Civil Service employees, respectively, by federal and state law. The Fifth Circuit found those cases analogous when it upheld Louisiana's prohibition against candidacy for non-judicial office by sitting judges. *Morial, supra,* 565 F.2d at 299-303. We submit that they are analogous here.

Kentucky's Amendment to Campaign Canon

In response to the decision of the special justices in this case, the regular elected members of Kentucky's Supreme Court (with Respondent Justice Combs not sitting) amended Canon 7B(1)(c) by Order of April 4, 1991 (the court's Order underlined added language and bracketed deleted language so that the following quote reflects both the original language and the amended language):

> (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; *make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court;* or [announce his views on disputed legal or political issues;] misrepresent his identity, qualifications, present position, or other facts. [Underlining and bracketing by the Court.]

This amendment may be advanced as a reason to deny the petition. However, in light of the stipulated record, it is difficult for us to perceive how this case would be significantly different constitutionally under the amended rule. Of course, the case against Justice Combs under the old rule is not moot. More significantly, in regard to granting the writ, the conflict between the decision below and decisions of other state courts and federal courts on the First Amendment issue remains; the critical need for clarification of the First Amendment status of judicial campaign restrictions is not in the slightest diminished by the amendment to Kentucky's rule.

Questions as to the proper limits of judicial campaign statements abound. What can a judicial candidate say about himself? What can he say about his opponent? What can he say about the court to which he aspires? What can

he say about the system? What can he say about potential litigants or issues, if anything?

Can a judicial candidate present himself as favoring individuals over companies, institutions or the state? Or employees over management? Or taxpayers over government? Or teachers over school boards? Or tenants over landlords? Or injured persons over insurance companies? A reading of the *Berger* and *Kaiser* cases cited above might furnish a basis for delineating what is permissible and what is prohibited. The Kansas case of *In Re Baker,* 218 Kan. 209, 542 P.2d 701 (1975), although not decided in constitutional terms, sheds considerable additional light on the subject. These authorities suggest a clear barrier against any campaign statements that appeal to special or partisan interests. However, the decision of the Kentucky court for which certiorari is sought is in conflict with these decisions.

The extent to which the states can restrict the campaign statements and conduct of candidates for judicial office affects both the nature of judicial election campaigns and the public's perception of the judicial branch of government.

This case presents a First Amendment issue of great national importance. The parameters of the First Amendment will always be an issue in the case by case enforcement of ethical codes applicable to elections of judges regardless of the form of the canons. Those parameters will be addressed in varying ways by state and federal courts until this Court settles the issue.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Kentucky.

Respectfully submitted,

GEORGE F. RABE
Counsel of Record
1004 First National Building
Main & Upper Streets
Lexington, Kentucky 40507-1708
(606) 255-2313

JAMES D. LAWSON
Executive Secretary
Judicial Retirement and Removal Commission
P.O. Box 21868
Lexington, Kentucky 40522-1868
(606) 269-1476
Counsel for Petitioner

May 30, 1991

APPENDIX

APPENDIX

APPENDIX A

TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

90-SC-000130-RR

J.C.J.D. - - - - - - - - - *Movant*

IN SUPREME COURT

R.J.C.R. - - - - - - - - - *Respondent*

OPINION AND ORDER

BY SPECIAL JUSTICE RUTH H. BAXTER

Disciplinary proceedings were initiated against J.C.J.D. ("Justice Combs") by the R.J.C.R. ("Commission") on November 7, 1988, pursuant to Supreme Court Rule 4.180, for conduct during his campaign for the Kentucky Supreme Court in the primary election, and thereafter as a candidate for justice of the Supreme Court in the general election. He was elected to the Court by the voters of the Seventh Judicial District in the 1988 November General Election.

Seven (7) separate violations of the Code of Judicial Conduct ("Code") were charged which can be summarized as follows:

> *Count I:* Justice Combs violated SCR 4.020(1)(b)(i) and Canon 7(B)(1) by announcing his views on disputed legal and political issues by critizing the "firemen's rule," laws against carrying handguns by felons, and the standard for court review of workers' compensation cases;

Count II: Justice Combs violated SCR 4.020(1)(b)(i) and Canon 7(B)(1)(b) and (c) when he allowed the Jefferson County Sheriff to send a letter on his behalf to sheriffs, police chiefs and fire chiefs in Seventh Judicial District discussing his position on the "firemen's rule";

Count III: Justice Combs violated SCR 4.020(1)(b)(i) and Canons 1, 2, and 7(B)(1) when he criticized the Code and the Supreme Court;

Count IV: Justice Combs violated SCR 4.020(1)(b)(i) and Canons 1, 2, and 7(B)(1) by challenging his opponent to a televised debate, and making statements concerning his opponent and the Supreme Court's ruling in a personal injury case;

Counts V, VI and VII: Justice Combs violated SCR 4.020(1)(b)(i) and Canon 7(B)(1) through statements that appeared in his campaign advertisements.

Counts I, II, III and IV resulted from a written complaint filed with the Commission, and Counts V, VI and VII were initiated by the Commission upon its own motion.

The Code violation charges followed a preliminary investigation by the Commission in June of 1988, and an informal discussion conference with Justice Combs on August 19, 1988. Notice of the alleged Code violations was given to him by letter dated August 23, 1988. Justice Combs denied the Commission's charges and further defended that the application of the Code to his campaign conduct was violative of his federal and state constitutional rights. Formal charges were subsequently filed on November 7, 1988. An amendment to the charges was made by the Commission, and a full hearing on all amended charges held on July 27, 1989. A Stipulation of Facts, with copies of the campaign material in question, was entered into by the parties and is filed with the record

By order dated February 10, 1990, the Commission found Counts I, III, IV, V, VI, and VII proved by "clear and convincing evidence," and determined Justice Combs' campaign conduct violative of the Code. Count II was dismissed upon motion of counsel for the Commission on the basis that the charge could not be proved. The Commission further found that the conduct of Justice Combs was deliberate and in bad faith, and therefore constituted "misconduct in office" in violation of SCR 4.020(1)(b)(i). It ordered Justice Combs suspended from his elective office and his judicial duties without pay for a period of three (3) months.

Justice Combs appealed the Commission's Order to this Court, seeking review of the Findings of Fact, Conclusions of Law and Order of the Commission. We are required to accept the Commission's findings and conclusions unless they are clearly erroneous. Based upon the controlling case law and for the reasons cited herein, the Court hereby holds that the Findings and Order of the Commission relating to Counts I, III, IV, V, VI, and VII, are clearly erroneous, and further, are in contravention of state and federal law:[1]

The United States Constitution guarantees the right of an individual to free speech. Accordingly, Congress can make no law abridging the freedom of speech. First Amendment, U.S. Constitution. Similarly, Section Eight of the Kentucky Constitution provides that "(e)very person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty."

Freedom of speech extends to a candidate for public office, including judicial offices. "The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously

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[1]Count II was dismissed on the Commission's own motion.

and tirelessly to advocate his own election. . . ." *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). This right of free speech is not absolute, however. States have the authority to regulate this conduct within certain limitations if in the public interest. *Valentine* v. *Chrestensen,* 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942). "(A) person does not (however) surrender his constitutional right to freedom of speech when he becomes a candidate for judicial office. A state cannot require so much." *American Civil Liberties Union of Florida, Inc., et al.* v. *The Florida Bar, et al.,* 744 F. Supp. 1094 (1990).

The courts are charged with reviewing state regulations to determine if a regulation is necessary to serve a compelling state interest, and if it has been narrowly written to protect against the evil that the government can control. *Brown* v. *Hartlage,* 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982). Where a regulation extends so far as to completely outlaw speech because of the subject matter of its content, there is a strong presumption of its unconstitutionality. *Widmar* v. *Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981).

Moreover, restrictions affecting free speech that can result in disciplinary action to the speaker are subject to an even stricter scrutiny. *In re Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978). The question then becomes whether the enacted regulation has been so narrowly drafted, and strictly applied, that the compelling state interest is served without unnecessarily burdening the exercise of free speech? *See, First National Bank of Boston* v. *Bellotti,* 435 U.S. 765; 98 S.Ct. 1407; 55 L.Ed.2d 707 (1978).

By Section 121 of the Kentucky Constitution, the authority to regulate the conduct of the judiciary was conferred upon the Kentucky Supreme Court. The Code was adopted, effective January 1, 1978, through Supreme Court

Rule, drawing upon the text of the 1972 American Bar Association ("ABA") Model Code of Judicial Conduct. The ABA Model Code was substituted for the 'Canons of Judicial Ethics" which had been originally formulated some 50 years earlier to provide judges with minimum ethical standards of conduct. Although minor amendments have been made to Kentucky's Code since its adoption, there have been no substantive changes in its provisions since that time, nor has this Court previously considered the more recent Model Code of Judicial Conduct adopted by the ABA House of Delegates on August 7, 1990.

The focus of the allegations against Justice Combs centers on Canon 7(B)(1) of the Code. These sections provide in pertinent part that a candidate for judicial office:

> (a) should maintain the dignity appropriate to judicial office, . . . ; (and)
>
> (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (or) announce his views on disputed legal or political issues. . . . SCR 4.300, Canon 7(B)(1).

The Commission found that the statements made by Justice Combs announced his views on conflicting judicial opinions which it termed "disputed issues," giving him an "unwarranted and illegal advantage in the election over his primary opponents." Commission Findings at 7. It further determined that his criticism of a Supreme Court personal injury decision, and his opponent's vote on the case, was an indirect pledge or promise of conduct in office other than the faithful and impartial performance of his duties of office. *Id.* at 9. Moreover, because Justice Combs had been "explicitly warned" in the Commission's informal conference after the primary election that his campaign conduct may be in violation of the Code, and he subse-

quently continued to speak out on such issues, the Commission found his actions were "undertaken deliberately and in bad faith, and constituted misconduct in office in violation of SCR 4.020(1)(b)(i)." *Id.* at 10-11.

Justice Combs argues that by becoming a judicial candidate, subject to the Code, he did not lose his right to exercise his free speech. By discussing opinions that he has authored, criticizing his opponent's position on legal issues, and explaining to the public his judicial philosophy, he was, he submits, informing the electorate of his views so that an informed decision could be reached at the ballot box. Justice Combs asserts that to restrict his political speech from *all* "disputed legal or political issues" unconstitutionally deprives him of free speech without a compelling state interest.

There can be no question that the state has a compelling interest to protect and preserve the integrity and objectivity of the judicial system. "The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party or person is entitled to the greatest respect." *Morial* v. *Judiciary Comm'n.,* 565 F.2d 295 (5th Cir. 1977), *cert. denied,* 435 U.S. 1013, 98 S.Ct. 1887, 56 L.Ed.2d 395 (1978). Untruthful or misleading statements, or pledges of specific judicial conduct on pending cases, cannot be tolerated. Nor can judicial candidates be allowed to make promises or predispositions of cases or issues that are likely to come before the courts that might reflect upon a judge's impartiality.

However, SCR 4.300 Canon 7(B)(1)(c) is not so narrowly drawn as to limit a candidate's speech to such specific prohibitions. Instead, the section prohibits *all* discussion of a judicial candidate's views on disputed legal or political issues, and thus unnecessarily violates fundamental state and federal constitutional free speech rights of judicial candidates.

It should be noted that Kentucky's Constitution provides for the selection of its judiciary by popular election.[2] Ky. Constitution, Section 117. Accordingly, we ". . . must recognize the candidates' right to make campaign speeches and the concomitant right of the public to be informed about the judicial candidates." *American Civil Liberties, supra,* at 7. Other than allowing a judicial candidate to state a professional history, and promise faithful and impartial performance of duties if elected, the existing Canon strictly prohibits dialogue on virtually every issue that would be of interest to the voting public. Inasmuch as the purpose of an election is to give the electorate the opportunity to become informed on a judicial candidate's qualifications for the position, which would include, among other things, knowledge of the law, and personal views and beliefs, the Canon fails in this respect. Instead, we are encouraging the public to judge candidates for our judiciary by not much more than their personal appearances. We believe a well informed electorate is essential to the democratic election process guaranteed by the Kentucky Constitution. The rights of the voting public to hear what a candidate has to say is a compelling one. We further believe candidates for judicial office can announce their views on legal and political issues without jeopardizing the integrity and independence of the legal system or undermining the impartiality of the judiciary. See, Code, Canons 1 and 2.

Moreover, we are not persuaded by the Commission's argument that the language of Canon 7(B)(1)(c) prohibiting all discussion of "disputed legal issues" by judicial candidates is necessary to prevent campaign statements which

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[2]Kentucky is one of 10 states that utilize a nonpartisan election for selection of its judges at all court levels. The merit selection method is utilized by the majority of the states.

may indicate a predisposition or bias in favor of one litigant over another. To specifically prohibit this type of campaign conduct and avoid constitutional concerns, this Canon provision can be rewritten in a much narrower scope to outlaw discussion of pending or future litigation. We are mindful that the ABA did just that when it recently amended its Model Code. ABA Canon 7, as amended, now prohibits judicial candidates from ". . . mak(ing) statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court. . . ." ABA Model Code (August 1990). In its Commentary accompanying this revision, the ABA explained its change from the previous language of the Model Code:

> . . . (T)he phrase 'stated personal views on issues that may come before the Court' replaced 'announce his view on disputed legal or political issues' because the Committee (on Ethics and Professional Responsibility) believed *the latter was an overly broad restriction on speech.* (emphasis added)

Furthermore, as to the question of whether Justice Combs' campaign advertisements reached the level of making a pledge of preferential treatment to one class of persons over another in violation of Canon 7(b)(1)(c), we could find no evidence to support the Commission's findings. See, Commission Findings at 10-12. The campaign advertisements in question do not include the exact statements which the Commission attributed to Justice Combs, nor do we believe the advertisements as published violated this Code provision. Moreover, we did not find that the statements referred to in Counts I, IV, V, VI and VII amounted to pledges or promises of conduct in office. At no time has there been a claim that the ads contained false

or misleading information which would have given the public an incorrect understanding of the issues.

Political advertisements, while undoubtedly designed to elect a candidate to office, should provide a voter with information to make an intelligent decision at the ballot box. It should be noted that the United States Supreme Court has recently considered the public's ability to review paid advertisements and utilize the information contained therein in its proper perspective. "(T)he disclosure of truthful, relevant information is more likely to make a positive contribution to decision-making than is concealment of such information." *Peel* v. *Attorney Registration and Disciplinary Comm'n.*, ___ U.S. ___, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990). (1990). While *Peel* was rendered in the context of commercial free speech and not judicial elections, the principal that disclosure of information allows the general public to make informed decisions is equally applicable here.

Finally, we must address the Commission's determination that Justice Combs' campaign conduct failed to uphold the integrity of the judiciary, did not promote the impartiality of the judiciary, and did not maintain the dignity appropriate to judicial office. See, Code, Canons 1 and 2; 7(B)(1)(a); Commission Findings at 7-9. The basis for these Findings again centers on speech which falls within constitutional protections. We can find no evidence that violations of these Canons occurred, especially when viewed in the context of Justice Combs' right to free speech. To criticize the provisions of the Code and published court decisions does not in our view, in and of itself, undermine the public's confidence and respect for the judiciary.

Because of our ruling herein, we find it unnecessary to address the other issues raised by the parties herein in their briefs.

Accordingly, It Is Hereby Ordered that the Findings of Fact, Conclusions and Order of the Commission are vacated and set aside, and all of the charges against Justice Combs should be, and are hereby, dismissed.

Special Chief Justice Ruth H. Baxter, and Special Justices Robert L. Bertram, William Donald Overbey, Patrick W. Mattingly, David F. Pratt, Thomas J. Meyer, and William H. Jones, Jr., sitting. All concur. Special Justice Bertram files a concurring opinion.

Entered February 14, 1991.

(s) Ruth H. Baxter
Ruth H. Baxter
Special Chief Justice

Bertram, Special Justice, concurring.

I agree with the rationale and result reached by the majority; however, I do not think the opinion goes far enough in that the Commission materially misrepresented what the advertisements actually said. A body such as the Commission should use extreme diligence to insure that the quotes they attribute to a candidate are accurate. One of the Commission members had obviously formed an opinion at the informal conference and, having done so, should have disqualified himself from serving.

As the Judicial Canon has been determined unconstitutional, it should be rewritten by this Court.

Attorneys for Movant:

HON. FRANK E. HADDAD, JR.
HON. GEORGE SALEM, JR.
5th Floor
Kentucky Home Life Building
Louisville, KY 40202

Attorneys for Respondent:

HON. GEORGE F. RABE
1004 First National Building
Main and Upper Streets
Lexington, KY 40507

HON. JAMES D. LAWSON
Executive Secretary
Retirement and Removal Commission
P.O. Box 21868
Lexington, KY 40522

SUPREME COURT OF KENTUCKY

90-SC-000130-RR

J.C.J.D. - - - - - - - - - *Movant*

IN SUPREME COURT

R.J.C.R. - - - - - - - - - *Respondent*

ORDER AMENDING OPINION AND ORDER

The Opinion and Order entered February 14, 1991, in the above-styled case is hereby amended to correct the cite located in the first paragraph on Page 7 of the order. Attached is a corrected Page 7 *reflecting the cite amendment: *Morial* v. *Judiciary Comm'n.*, 565 F.2d 295 (5th Cir. 1977), *cert. denied,* 435 U.S. 1013, 98 S.Ct. 1887, 56 L.Ed.2d 395 (1978).

ENTERED March 11, 1991.

(s) Ruth H. Baxter
Acting Chief Justice
Ruth Baxter

*[The amendment set out full cite to the *Morial* case. The Opinion has been printed above as corrected by the Court.]

APPENDIX B

COMMONWEALTH OF KENTUCKY

JUDICIAL RETIREMENT AND REMOVAL COMMISSION

In Re The Matter Of:

JUSTICE DAN JACK COMBS,
SEVENTH SUPREME COURT DISTRICT
SUPREME COURT OF KENTUCKY

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

I. Statement of Charges

The Judicial Retirement and Removal Commission of the Commonwealth of Kentucky was created for the purpose of, and is vested with the jurisdiction to, initiate, hear and decide charges of official misconduct by any judge of the Court of Justice or lawyer while a candidate for judicial office, and upon a finding of such official misconduct, to impose sanctions pursuant to SCR 4.020.

The Commission instituted proceedings against Justice Dan Jack Combs on November 7, 1988, under Supreme Court Rule 4.180. At the time, Justice Combs was an incumbent judge of the Court of Appeals of Kentucky. The charges against Justice Combs relate to his conduct during the campaign for the primary election held on May 24, 1988, and immediately thereafter, and to his conduct while a candidate for justice of the Supreme Court in the general election held on November 8, 1988. Justice Combs was elected Supreme Court Justice in the general election.

The Commission charged Justice Combs with seven separate violations of the Code of Judicial Conduct. The charges were as follows with Counts I through IV being related to his conduct during the primary election and V through VII to the general election:

Count I—Justice Combs violated Rule 4.020(1)(b)(i) of the Rules of the Supreme Court and Canon 7(B)(1) when he announced his views on disputed legal and political issues by criticizing a rule known as the "firemen's rule" and the laws against the carrying of handguns by felons and the standard for court review of workers' compensation cases.

Count II—Justice Combs violated Rule 4.020(1)(b)(i) of the Rules of the Supreme Court and Canon 7(B)(1)(b) and (c) when he allowed Jefferson County Sheriff James D. Greene to send a letter on his behalf to sheriffs, police chiefs and fire chiefs in 21 eastern Kentucky counties in the Seventh Judicial District which discussed his position on the "firemen's rule".

Count III—Justice Combs violated Rule 4.020(1)(b)(i) of the Rules of the Supreme Court and Canons 1, 2, and 7(B)(1) when he criticized the Code of Judicial Conduct by stating that the Code "is a self-proclaimed power that they have assumed, and it is not the law," that it violates First Amendment rights, that "they'd like to be able to silence everyone, but I have a First Amendment right that no one can take away," and that "court members don't want their laundry viewed. They want to keep it in the closet, out of the view of the citizenry. I'm trying to bring it into the light," and by stating that "the Constitution does not swear us to do what judges tell us to do" and that he had sworn to support the Constitution, not an election code.

Count IV—Justice Combs violated Rule 4.020(1)(b)(i) of the Rules of the Supreme Court and Canons 1, 2, and 7(B)(1) when he accused his incumbent opponent "of fav-

oring the powerful over working people," challenged said opponent to a televised debate, attacked a Supreme Court decision in a personal injury case and stated that the Supreme Court (and impliedly the incumbent) failed to follow the law and the Constitution.

Count V—Justice Combs violated Rule 4.020(1)(b)(i) of the Rules of the Supreme Court and Canon 7(B)(1) when he placed or caused to be placed in newspapers circulated in the Seventh Supreme Court District an ad whereby he represented himself "to hold the rights of the individual to be more important than the interest of the State, companies or institutions/agencies."

Count VI—Justice Combs violated Rule 4.020(1)(b)(i) of the Rules of the Supreme Court and Canon 7(B)(1) when he placed or allowed to be placed in newspapers circulated within the Seventh Supreme Court District an ad whereby he represented himself "as having a higher regard for the rights of individuals."

Count VII—Justice Combs violated Rule 4.020(1)(b)(i) of the Rules of the Supreme Court and Canon 7(B)(1) when he placed or caused or allowed to be placed in newspapers circulated in the Seventh Supreme Court District an ad whereby he represented himself as "a friend of the working men and women."

II.

PROCEEDINGS

1. The charges against Justice Combs that are contained in Counts I, II, III and IV resulted from a written complaint filed with the Commission; the charges that are contained in Counts V through VII resulted from action initiated by the Commission upon its own motion after the campaign ads were placed in newspapers prior to the general election held November 8, 1988.

2. On June 17, 1988, the Commission authorized a preliminary investigation into the conduct of Justice Combs and directed that the Executive Secretary invite Justice Combs to the next meeting for an informal conference pursuant to SCR 4.170(2). Upon completion of the investigation and before the next meeting, the commission received from its investigator written reports about the matters in question.

3. Justice Combs appeared before the Commission for an informal discussion on August 19, 1988, concerning the charges and findings of the preliminary investigation.

4. By letter dated August 23, 1988, the Commission gave Justice Combs the factual information in the custody of the Commission, including the name of the complainant, for his examination and afforded him an opportunity to present any other information bearing on the investigation. Justice Combs submitted a position paper, dated September 26, 1988, for consideration by the Commission.

5. The Commission initiated formal charges against Justice Combs by mailing to his counsel Formal Proceedings and Charges dated November 7, 1988. Counsel for Justice Combs replied to the charges by answer dated November 28, 1988.

6. Counsel for Justice Combs, by motion dated December 16, 1988, asked the Commission to dismiss with prejudice the charges on the basis that (a) Canons 1, 2, and 7(B)(1) of the Code of Judicial Conduct, as applied in the charge, are violative of the right of free speech, (b) Canons 1, 2 and 7(B)(1), as applied to the allegations in the charge, deny the respondent the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution, and (c) Canons 1, 2 and 7(B)(1), as applied, deprive the citizens of the Commonwealth of Kentucky of any meaningful exercise of the right to vote for judicial

candidates as provided for in Sections 117 of the Kentucky Constitution.

7. The Commission amended the formal charges against Justice Combs by mailing to his counsel Amendment to Notice of Formal Proceedings and Charges dated April 21, 1989. Counsel for Justice Combs replied to the amended charges by Response to Amendment to Notice of Formal Proceedings and Charges dated May 12, 1989.

8. Justice Combs, by motion dated July 27, 1989, renewed his motion to dismiss with prejudice the charges on the basis announced in (6) above and on the additional basis that (a) Supreme Court Rule 4.020(1)(b)(i) and Rule 4.300, Canon 7(B) are unconstitutionally vague and overbroad and (b) the punishment of the speech at issue in this case would infringe Justice Combs' right to criticize the government.

9. Counsel for the Commission and counsel for Justice Combs, on July 27, 1989, entered into and filed a Stipulation of Facts which is identified in the record as Commission Exhibit #1.

10. Justice Combs was accorded a full hearing on July 27, 1989, at which time he appeared with counsel, testified on his own behalf, and offered other evidence.

III.

Findings and Conclusions of Law Motions to Dismiss

The Commission unanimously overrules Justice Combs' motions dated December 16, 1988, and July 27, 1989, to dismiss the charges on constitutional grounds. The Commission does not have the authority to rule on the constitutionality of the Rules governing the functions of the Commission, rules adopted by the Kentucky Supreme Court. Any decision by the Commission to dismiss this proceeding

on constitutional grounds would in effect preclude the right of the Kentucky Supreme Court to review the actions of the Commission as provided in Section 121 of the Kentucky Constitution. The constitutional issues raised by Justice Combs are issues for the Supreme Court of Kentucky, not the Judicial Retirement and Removal Commission.

However, it should be noted that all but one member of the Commission would reject Justice Combs' constitutional arguments and find that the Code of Judicial conduct, on its face and as applied to the facts in this case, is constitutional.

Count I

The Commission finds, one member dissenting (dissent on page 12), that the charges in Count I are proved by clear and convincing evidence. In the primary campaign, Justice Combs publicly announced his views on the legal principle known as the "firemen's rule," the law against felons carrying handguns, and the standard of judicial review of workers' compensation cases. He did so for the admitted purpose of obtaining support from voters interested in the matters upon which he expressed these views, and he succeeded through these actions to obtain an unwarranted and illegal advantage in the election over his primary opponents. In so acting he "announced his views on disputed legal or political issues," made "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," and failed to "maintain the dignity appropriate to judicial office," all in violation of Canon 7(B)1 of the Code of Judicial Conduct. The Commission further finds that Justice Combs acted deliberately and in bad faith in violating his obligations under Canon 7(B)1 and that his deliberate actions constitute misconduct in office in violation of SCR 4.020(1)(b)(i).

Count II

Upon motion of counsel for Commission to dismiss Count II on the basis that the charges could not be proved, the Commission, by unanimous vote, dismissed the charges in said count.

Count III

The Commission finds, one member dissenting (dissent on page 12), that the charges in Count III have been proved by clear and convincing evidence. In the primary campaign, Justice Combs' characterized the Code of Judicial Conduct as an illegal "self-proclaimed power" that is used by members of the judiciary to hide their "laundry," and "keep it in the closet, out of the view of the citizenry." Furthermore, he clearly implied that his opponents in the election (both of whom were sitting members of the judiciary) were hiding behind the Code of Judicial Conduct. In so acting Justice Combs violated Canon 1 of this Code by failing to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved. Furthermore, he violated Canon 2 of the Code by failing to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The Commission further finds that the conduct of Justice Combs in this regard is so obviously improper that it clearly constitutes misconduct in office in violation of SCR 4.020(1)(b)(i).

Count IV

The Commission finds, one member dissenting in part (dissent on page 12), that the charges in Count IV are proved by clear and convincing evidence. In the primary campaign Justice Combs lodged a public attack on a decision of the Supreme Court in a particular personal injury case, declaring that the Court had failed to follow the law

and the Constitution; moreover, he publicly challenged one of his opponents (who was a sitting member of the Supreme Court when the decision in question was rendered) to a televised debate concerning his vote in this personal injury case. In a more direct attack on this opponent, Justice Combs accused the incumbent member of the Court "of favoring the powerful over working people." Justice Combs sought through these acts to obtain an advantage with voters by portraying his opponent as an enemy of personal injury claimants and a protector of privileged members of society. In so acting he violated Canon 1 of the Code of Judicial Conduct by failing to observe high standards of conduct required to preserve the integrity and independence of the judiciary. He violated Canon 2 of the Code by failing to conduct himself in a manner that promotes public confidence in the judiciary and Canon 7(B)1 by announcing his views on disputed legal or political issues and by making pledges or promises in office other than the faithful and impartial performance of the duties of the office. The Commission further finds that the conduct of Justice Combs was deliberate and in bad faith and in this regard constitutes misconduct in office in violation of SCR 4.020(1)(b)(i).

Count V

The Commission finds, one member dissenting (dissent on page 12), that the charges in Count V are proved by clear and convincing evidence. After appearing before the Commission for an informal conference and being explicitly warned that his campaign conduct may be in violation of the Code of Judicial Conduct, Justice Combs returned to the campaign trail for the general election and proceeded to commit even more egregious violations of the Code. Within seven days of the election, Justice Combs placed an advertisement in numerous newspapers in the Seventh

Judicial District in which he pledged "to hold the rights of the individual to be more important than the interest of the state, companies or institutions/agencies." (The advertisement in question is identified in the record as Commission Exhibit #3). The Commission finds that such conduct in a judicial campaign is not only violative of the Code of Judicial Conduct but is flagrant, outrageous and incompatible with the legal and ethical obligations of a member of the judiciary. A pledge of preferential treatment to individuals over companies or institutions, without regard to the merits of cases, is demagoguery at its worst. In repeating his prior violations of the Code and in pledging preferential treatment for potential voters, Justice Combs sought and obtained an unwarranted and illegal advantage over his opponents in the election. It is the Commission's firm belief that his actions in this regard contributed greatly to the reversal of results from the primary to the general election; after finishing second to the incumbent in the primary election, Justice Combs won the general election by a margin of 17,500 votes. The Commission finds that through the foregoing actions, Justice Combs committed a flagrant violation of Canon 7(B)1 of the Code of Judicial Conduct. Furthermore, the Commission finds that Justice Combs' actions in this regard were undertaken deliberately and in bad faith and constituted misconduct in office in violation of SCR 4.020(1)(b)(i).

Count VI

The Commission finds, one member dissenting (dissent on page 12) and one member abstaining, that the charges in Count VI are proved by clear and convincing evidence. Justice Combs, as a companion to the ad described in the paragraph on Count V above, ran another ad during the seven days prior to the general election whereby he was

depicted "as having a higher regard for the rights of individuals." (The advertisement in question is identified in the record as Commission Exhibit #4). The Commission finds that the ad was placed with the intention of presenting his views to the electorate to get votes in the campaign. The ad implied a pledge of conduct in office other than the faithful and impartial performance of duties of the office and announced his views on disputed legal or political issues. For the same reasons explained in the paragraph on Count V above, the Commission finds that the actions of Justice Combs were a flagrant violation of Canon 7(B)1 of the Code of Judicial Conduct. The Commission further finds that Justice Combs' actions were deliberate and in bad faith and constituted misconduct in office in violation of SCR 4.020(1)(b)(i).

Count VII

The Commission finds, one member dissenting (dissent on page 12), that the charges in Count VII are proved by clear and convincing evidence. Justice Combs, within seven days of the general election, ran an ad in which he represented himself as "a friend of the working men and women." (The advertisement in question is identified in the record as Commission Exhibit #5.) The Commission finds that the ad implies preferential treatment to working men and women and was placed by Justice Combs with the specific intention of influencing and presenting his views to the voters. For the same reasons explained in the paragraph on Count V above, the Commission finds that the actions of Justice Combs were a flagrant violation of Canon 7(B)1 of the Code of Judicial Conduct. The Commission further finds that Justice Combs' actions were deliberate and in bad faith and constituted misconduct in violation of SCR 4.020(1)(b)(i).

Dissenting Opinion of Dr. Lewis Wesley

I dissent from the majority and vote that Justice Combs be admonished only. I shall address each of the counts separately.

Count I

In summary, I do not believe that the charges in Count I have been proved by clear and convincing evidence for the following reasons:

a. Justice Combs did not announce his views on disputed legal or political issues during the campaign because his views had already been announced when he wrote opinions in cases while a member of the Kentucky Court of Appeals.

b. Justice Combs had a right to state his views on the "firemens' rule," the law against felons carrying handguns, and the standard of judicial review of workers' compensation case, in opposition to his opponents stand on these legal principles.

c. It was the legal and ethical duty of Justice Combs to so inform the public as to his previous actions on the Court of Appeals and how he disagreed with the decisions rendered by his opponent as a member of the Supreme Court.

d. Justice Combs did not obtain an "illegal and unwarranted" advantage during the primary campaign by objecting to some of the decisions that his opponent rendered while on the Supreme Court.

e. The actions of Justice Combs did not constitute the "making of pledges or promises of conduct while in office" but were attempts to inform the public of his legal philosophy.

In the position paper submitted by Justice Combs on September 26, 1988, he denied that he made certain state-

ments that were printed in the newspapers and states that others were taken out of context. The Williamson Daily News quoted Justice Combs as stating that the "so-called Code" permitted courts to get away with things like the "firemen's rule" and to keep it away from the public. Canon 7(B)(1)(c) states that a judge running for judicial office should not express his views on *disputed* legal or political issues. As I understand it, Justice Combs stated his views on this issue (firemens' rule) in a written opinion whereby he criticized the court for taking away what he felt to be a constitutional right of a fireman. Would it have been wrong for Justice Combs to have answered a question regarding his views by stating, "I can't talk about this now, but if you will read my Court of Apepals opinion, you will know the answer? Did he mean for this to be a *pledge or promise* appealing to special interests any more than when he wrote the opinion? I think not. In a case cited in Justice Combs' brief (Hawkins v. Sunmark Industries, Inc., Ky. App., 84-CA-1952-MR (1985)), he stated that the action of the court violated Section 14 of the Constitution, thus criticizing the Supreme Court. Is this illegal when writing an opinion? If not, then why is it unlawful for Justice Combs to restate what he wrote in the opinion in an effort to inform the public? If it is illegal or against the letter of the Code, then charges should have been brought against him much earlier (at the time he wrote the opinion). Canon 7(A)(2) states that a judge holding such office will be deemed to be a candidate for re-election during the entire term of office. The opinions and decisions of the Court of Appeals are a matter of public record for anyone to research. In this case, I am not convinced that stating his views on subjects during the campaign constituted *announcing his views* on disputed legal or political issues, because they had already been announced earlier.

In terms of felons carrying handguns, Justice Combs did not say he favored felons carrying handguns, but that he felt the law prohibiting them from doing so was unconstitutional. I believe that Justice Combs has a right to that belief. Again, I question whether it is improper for a judge to restate during an election what he had previously stated in written opinions. I stand in awe of what might have been the reaction if Judge Combs had answered questions or stated an opinion on such topics as abortion, prayer in schools, the pledge of allegiance or burning of the American flag. Surely, he was asked his views on some of these controversial issues. Did he state his views on *all* controversial issues, or was it only on those that he had previously stated in written opinions? We don't know how he, or his opponent, stand on the issues, but if I was a voter in their district, I would like to know. How are we to find out?

Canon 7(A)(2) states that a judge holding office filled by public election between competing candidates, or a candidate for such office, may attend political gatherings and speak to such gatherings on his or her own behalf when he is a candidate for election or re-election. The Canon does not say that the candidates cannot explain and defend their previous Court of Appeals decisions in an effort to inform the public when speaking at such gatherings. I believe Justice Combs felt he should uphold the *law* first, then the rules. I cannot believe that the Supreme Court, in all its wisdom, would write any rule intended to deprive any individual of his or her First Amendment Rights. The incumbent would have all the advantage if the challenger could not state his views, and I cannot believe the Supreme Court meant this to be. A candidate can state his views on certain topics without getting into a heated argument. To take this right away, I feel the Code of Judicial Conduct would be applied unconstitutionally. The purpose of an election is to give each candidate the oppor-

tunity to better inform the public as to his views and beliefs. To prohibit this, one would soon be judging the candidates by their personal appearances, rather than by their intellect and experience. I feel sure that Justice Combs' motive was to win the election, and to do so, he felt he had to let the people know his judicial philosophy that *all people are entitled to equal justice whether they be a fireman or a felon.*

Count III

The charges in Count III were not proved by clear and convincing evidence for the following reasons:

a. The statement made by Justice Combs "that the Code is a self-proclaimed power that they have assumed, and it is not the law" was taken out of context. Justice Combs believed that only the Congress has the right to make laws and the Supreme Court could not legally make any rule that prohibits free speech, thereby disagreeing with his opponents previous actions as a member of the Supreme Court.

b. The statement made by Justice Combs "that the Constitution does not swear us to do what judges tell us to do" was taken out of context. Justice Combs was trying to state that only Congress can make the laws and the role of the judiciary is to interpret them.

c. I believe that it is the responsibility of the judicial candidates to state their views on legal philosophy and to explain how those views differ from their opponents.

Count IV

The charges in Count IV were not proved by clear and convincing evidence for the following reasons:

a. The law gives Justice Combs the right to feel that his opponent favored the powerful over the working peo-

ple and to so inform the public. By doing so, he assured his independence as a member of the judiciary.

b. Justice Combs should not have challenged his opponent to a debate since his opponent was a sitting member of the Supreme Court and should be admonished for doing so.

Justice Combs does not deny that he challenged his opponent to a debate. I believe that Justice Combs simply made an honest mistake in this regard. I do not feel that he did this maliciously, or was he influenced by hatred or spite for his profession, but that he wanted to let the public know the difference between the legal philosophies of the candidates. We must give Justice Combs the benefit of the doubt. This, however, in some small way, may have caused some embarrassment to the judiciary. Judging from his victory majority, the people of his district did not think so. However, I feel that this cannot be dismissed entirely.

Counts V through VII

The charges in Counts V through VII were not proved by clear and convincing evidence for the following reason:

a. Justice Combs made a decision to continue running his campaign in the general election as he had in the primary. Even though he had been warned by a member of the Commission that his campaign conduct may be in violation of the Code of Judicial Conduct, Justice Combs could find no law that prohibited him from such conduct and he made an honest decision to continue his campaign as before.

b. Justice Combs wanted the people to know that his opponent, by his record on the Supreme Court, had given preferential treatment to large companies and institutions,

and if elected, he would hold their (the peoples') interest to be just as important.

c. Justice Combs, as the challenger, had a right to disagree with his opponent, the incumbent, and by doing so, did not obtain an illegal and unwarranted advantage.

d. That the above action did not contribute greatly to the final outcome of the election. Justice Combs won the general election by a majority of 17,500 votes. The voters for the third candidate in the primary election could have teamed with those who voted for Judge Combs in an effort to unseat the incumbent.

Conclusion

I feel that the following questions must be answered in arriving at a just decision:

a. Did Justice Combs announce his views during the campaign or had they already been announced?

b. At the time of the campaign, were the matters that he discussed disputed legal or political issues?

c. Did Justice Combs harm the integrity, reputation and impartiality of the judiciary?

Canon 1 states that a judge *should* uphold the integrity and independence of the judiciary. Canon 2(A) states that a judge *should* respect to law . . . and *should* comply with the law. Canon 3(A)(1) states that a judge *should* be faithful to the *law* and maintain professional competence. Justice Combs took an oath to uphold the law, not rules. Canon 3(A)(6) states that a judge is not prohibited from making public statements in the course of his official duties. Is campaigning for a judicial office an official duty? Is it not the duty of a judge to let the public know his views and how he stands? Canon 4 states that a judge may engage in activities to improve the law, the legal system, and the

administration of justice (Justice Combs testified that he has tried to do this all his life and was one of the main reasons he ran for the Court of Appeals) if he does not cast doubt on his capacity to make an impartial decision. We all know that the First Amendment states that Congress shall make no *law* . . . abridging the right of free speech. The First Amendment doesn't say anything about *rules.* May the Supreme Court make rules that prohibit free speech? Justice Combs does not think so. If one follows the strict letter of the Code, then it appears that it has done so. Under the present Rules of the Supreme Court, a candidate or judge may only state that he will faithfully uphold and execute the duties of his office. How many judges, at some time, have not cirticized the Canons, either privately, among their peers, and even at public gatherings.

The Commission cannot declare the Code of Judicial Conduct to be unconstitutional, but we can be very careful not to apply the Code unconstitutionally. Would we be justified in sanctioning a judge for doing what he believes to be his God-given right under the constitution? I think not! This would only instill in him, all the other judges, the entire legal profession and the people who gave him the large majority, a sincere and bitter feeling that this Commission is loaded with judge haters who are without feeling and compassion and who are extremely unfair — more willing to hurt than to help. I believe that the action of the majority of this Commission deprives the people of Justice Combs' district of the right to elect. I would find it very difficult trying to explain to the people who gave him the 17,000 vote majority the *evils* of his restating what he had previously written in opinions, or trying to explain to them the *wrong* when he states that he is a "friend of the working men and women" and that he "has a higher regard for the rights of the individual." Would a private or public reprimand be called for? Perhaps, but what good

could come from this? Would it make him a better Justice of the Supreme Court, or would it only cause a great deal of embarrassment and a lifelong conscious desire to criticize the Canons and to work constantly for their dilution. *Would not our task be better served by trying to help, whether he be an alcoholic, or an aggressive candidate for the Supreme Court?*

As to the source and motive of the complainant, I realize that all complaints must be considered, regardless of their source. I am, however, somewhat disturbed in this case, as well as I have been in others, about the motive of the one who makes the complaint. I understand that the complainant in this case has been a long time political adversary of Justice Combs. Did the one making the complaint have the best interest of the judiciary at heart, or did he have his own best interest at heart? Was the complaint made because he felt the reputation, impartiality and integrity of the judiciary was being harmed or was he trying to harm the integrity and reputation of Justice Combs and thereby assuring his candidate a victory? Was what he did politically motivated in an effort to get his candidate elected? If so, I do not feel it deserves the respect of this Commission.

In the Commission's handling of this complaint, it has seemed to me that Justice Combs has been presumed guilty, and it has been up to him to prove his innocence. It seems to me that the Commission has tried very hard to prove this man guilty while failing to take into account that this complaint was brought about by a complainant who cares little about the judiciary and who believed that he could use this Commission to discredit his political enemy while knowing very well that he would not be involved in any way whatsoever.

It is my opinion that what the majority has done in this case will do more harm to the integrity and reputation of

the judiciary that what Judge Combs said or did during the entire campaign. It is most important that all of the judges, and members of the legal profession, retain and/or regain their trust and respect for this Commission. It is important that they feel that this Commission has a sincere desire to help them, not destroy them along with a lifetime of hard work. It is important that they realize that this Commission interprets the *spirit* of the rules, as well as the word, and somehow find the wisdom to do what is right and best for all. It is most important that we realize that all men are fallible and make mistakes (we included), and with the help of God, we can and will know the difference between honest and dishonest mistakes, and that we will act accordingly. Note that Rule 4.020(2) states that *any erroneous decision made in good faith shall not be subject to the jurisdiction of the Commission.*

With no other motive than to do what is right and best for all, but most especially for this honored and highly respected profession, and believing that Justice Combs did and does have the right to dissent and the right of freedom of speech . . . believing that he should be given the benefit of all doubts . . . believing that if he did make an erroneous decision, it was done in good faith . . . believing that he has not harmed the integrity or impartiality of the judiciary, I would send Justice Combs a letter of admonishment, stating in effect, that we feel he is a qualified, capable and able member of the Supreme Court, but that he, along with the other members of the judiciary, should abide by the rules of the profession, as well as by the laws of man and God.

Order

The Judicial Retirement and Removal Commission hereby orders Justice Dan Jack Combs suspended from office and his duties without pay for a period of three (3)

months. All members concur except Dr. Lewis Wesley who would vote to admonish Justice Combs.

Rule 4.270 provides that the Commission's order shall become effective and made public within ten days after service on the judge unless he files an appeal therefrom within that time.

I hereby certify that the above Findings of Fact, Conclusions of Law and Final Order of suspension from office for three (3) months represents a majority action of the Judicial Retirement and Removal Commission this 10th day of February, 1990.

(s) J. Michael Brown
J. Michael Brown, Chairman

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Findings of Fact, Conclusions of Law and Final Order has been served on Justice Dan Jack Combs by mailing a copy first class U.S. postage to Betsy Layne, Kentucky 41605 and to Hon. Frank E. Haddad, Jr., 5th Floor, Kentucky Home Life Building, Louisville, Kentucky 40202, attorney for Justice Dan Jack Combs, and to Hon. George Rabe, First National Building, Lexington, Kentucky 40507, Counsel for the Commission on this the 10th day of February, 1990.

(s) James D. Lawson
James D. Lawson
Executive Secretary

APPENDIX C

COMMONWEALTH OF KENTUCKY
JUDICIAL RETIREMENT AND REMOVAL COMMISSION

In Re The Matter Of:
DAN JACK COMBS, JUSTICE SEVENTH SUPREME COURT DISTRICT, SUPREME COURT OF KENTUCKY

STIPULATION OF FACTS

The following facts are stipulated for the hearing of this matter:

1. Justice Dan Jack Combs, at the time an incumbent judge of the Court of Appeals of Kentucky, was a candidate for Justice of the Kentucky Supreme Court in the Seventh Judicial District for the primary election held May 24, 1988, and for the general election held November 8, 1988. Justice Combs was elected Supreme Court Justice in the election of November 8, 1988.

2. Newspaper articles attached to Notice of Formal Hearing and Charges herein were published respectively in newspapers circulated in the Seventh Judicial District of the Supreme Court of Kentucky as follows:

Exhibit	Newspaper	Date
A	Louisville Courier Journal	5/19/88
B	Louisville Courier Journal	5/26/88
C	Lexington Herald Leader	5/19/88
D	Williamson Daily News	5/21/88
E	Williamson Daily News	5/23/88
F	Lexington Herald Leader	5/25/88
G	Louisville Courier Journal	5/16/88

Copies of said articles are attached hereto.

3. Justice Combs made to newspaper reporters who wrote said articles (a) those statements for which he was quoted in said articles; and (b) statements of which paraphrases attributed to him in said articles are fair paraphrases. Such quotes and paraphrases are highlighted in yellow on the attached copies.

4. Ads attached to the Amended Notice of Formal Hearing and Charges herein were paid for by the Committee to Elect Dan Jack Combs, Caleb Cooley, Treasurer, and placed in newspapers circulated in the Seventh Judicial District of the Supreme Court of Kentucky as follows:

	Newspaper	Date
Exhibits H & I	The Advocate, Mt. Sterling	11/3/88
	Appalachian News-Express, Pikeville	11/2/88
	The Clay City Times	11/3/88
	The Greenup News	11/3/88
	The Harlan Daily Enterprise	11/5/88
	The Herald-Voice, Hazard	11/3/88
	The Jackson Times	11/3/88
	The Morehead News	11/4/88
	The Morehead News	11/8/88
	The Paintsville Herald	11/2/88
Exhibit J	The Floyd County Times	11/2/88
	The Harlan Daily Enterprise	11/3/88
	Tri-City News, Benham	11/2/88.

5. This stipulation of facts shall have the same effect as if the facts stipulated were established by testimony.

6. Justice Combs does not by this stipulation of facts stipulate any violation of the Code of Judicial Conduct and denies that any of these statements or ads violate Supreme Court Rules or the Code of Judicial Conduct. Justice Combs reserves the right to explain these statements, the

context in which they were made and his intent in making these statements. He further reserves the right to present constitutional arguments in the defense of these statements and ads.

This stipulation entered into and filed with the Judicial Retirement and Removal Commission this 27th day of July, 1989.

(s) George F. Rabe
George F. Rabe, Attorney for
The Commission

Frank E. Haddad, Attorney for
Justice Dan Jack Combs

APPENDIX D

EXCERPTS OF STIPULATED STATEMENTS FROM NEWSPAPER ARTICLES

Count I

Announcement of Views on Disputed Issues of: "Firemen's Rule", Law Against Carrying of Handguns by Felons, and Court Review of Workers' Compensation Cases.

Louisville Courier Journal, May 19, 1988—Commission Exhibit 1A:

> In a recent interview, Combs talked at length about specific issues. He said the standard for court review of workers' compensation cases is unconstitutionally strict. He said the so-called "Fireman's Rule" deprives firefighters and law-enforcement officers injured on the job of a "remedy by due course of law."

Louisville Courier Journal, May 26, 1988—Commission Exhibit 1B:

> Primarily, however, he said he would continue to discuss legal issues—a practice that has prompted questions. The state Code of Judicial Conduct prohibits a judicial candidate from announcing views "on disputed legal or political issues."
>
> Combs challenged Stephenson to a televised debate, and he launched an attack on a recent state Supreme Court decision in a personal-injury case.

Lexington Herald Leader, May 19, 1988—Commission Exhibit 1C:

> On the other hand, Combs notes he has argued that a law prohibiting felons from owning handguns violates the constitutional right to bear arms.

Williamson Daily News, May 21, 1988 — Commission Exhibit 1D:

> Combs said, "This so-called code permits courts to get away with things like the firemen's rule and to keep it away from the public. This is just one of many cases where judges have closed the courthouse doors to injured people."
>
> * * *
>
> Combs has been outspoken also about the laws which denies handguns to convicted felons. "The law is in direct opposition to the Constitution which gives all people the right to bear arms. But the Kentucky General Assembly went on and passed another law in clear violation of Section 1 and 6, of the Constitution which is beyond the general powers of the assembly to change."
>
> He added, "the judges are to declare the law and not to make the law. I am trying to reverse (this trend) and to reinstate what the Constitution says. Unless the courts or the removal commission can point to the Constitution as a source of the power they are proporting (sic), then they do not have that power."

Count III

Criticism of Code of Judicial Conduct as Rule of Law.

Louisville Courier Journal, May 19, 1988, Commission Exhibit 1A:

> Combs, a champion of unpopular causes, questions the authority of Supreme Court members, who wrote the code, to draft such regulations.
>
> "It is a self-proclaimed power that they have assumed, and it is not the law – contrary to what they may believe," Combs said.

He contends the rules are inconsistent with the Kentucky Constitution, which provides for the popular election of judges, and violate candidates' First Amendment right of free speech.

Court members "don't want their laundry viewed," Combs said. "They want to keep it in the closet, out of the view of the citizenry. I'm trying to bring it into the light."

Williamson Daily News, May 21, 1988 — Commission Exhibit 1D:

"Judges are not lawmakers," Combs said. "The Constitution is the supreme law of the land," he added, "the law of our lawmakers. This is what all officials, state and federal, are sworn to uphold. It (the code) is a self-proclaimed power that they have assumed, and it is not the law, contrary to what they may believe. I can well understand their concern of my alleged violation of the code. Court members don't want their laundry viewed. They want to keep it in the closet, out of the view of the citizenry. I'm trying to bring it into the light."

* * *

Combs said, "This so-called code permits courts to get away with things like the firemen's rule and to keep it away from the public. This is just one of many cases where judges have closed the courthouse doors to injured people,"

* * *

He added, "the judges are to declare the law and not to make the law. I am trying to reverse (this trend) and to reinstate what the Constitution says. Unless the courts or the removal commission can point to the Constitution as a source of the power they are proporting (sic), then they do not have that power."

Would Combs unseat the present supreme court and court of appeals?

"Either they should be unseated or I should," he said, "somebody is wrong. We are supposed to be a constitutional democracy. There is nothing more important than the people. The people are the boss, they have the power, we are nothing more than trustees for the public. I sworn to support and defend the Constitution and the Constitution does not swear us to do what judges tell us to do."

Lexington Herald Leader, May 19, 1988, Commission Exhibit 1C:

Combs has found plenty to talk about.

"They'd like to be able to silence everyone, but I have a First Amendment right that no one can take away," said Combs, who said he had sworn to support the state Constitution, not an election code.

"They say we're bound, but the judges say that," Combs said. "I look at the constitution to see where the people gave them that authority. . . . It's not there." (Omission in original.)

Count IV

Accusation of Favoring the Powerful Over Working People, Challenge of Opponent to a TV Debate, Attack on Supreme Court Decision in Personal Injury Case, Stating that the Court Failed to Follow the Law and Constitution.

Louisville Courier Journal, May 16, 1988, Commission Exhibit 1G:

During a recent interview, Combs charged that Stephenson is too old for a third eight-year term. He

accused Stephenson of favoring the powerful over working people.

He said the Supreme Court, in various ways, has denied victims of wrongs access to the courts. He also criticized state courts in general for failing to abide by the wording of laws and the Constitution.

"Some of these judges say its our duty to interpret," Combs said. "I say that's a bunch of crap."

Louisville Courier Journal, May 26, 1988, Commission Exhibit 1D:

Combs, a flamboyant champion of unpopular causes, said county officials and party leaders reacted against his challenge to the establishment. "They saw that there was a good chance that their apple cart might be upset," he said. He has criticized Stephenson as favoring the powerful over working people.

* * *

Primarily, however, he said he would continue to discuss legal issues — a practice that has prompted questions. The state Code of Judicial Conduct prohibits a judicial candidate from announcing views "on disputed legal or political issues."

Combs challenged Stephenson to a televised debate, and he launched an attack on a recent state Supreme Court decision in a personal-injury case.

Lexington Herald Leader, May 19, 1988, Commission Exhibit 1C:

In an interview yesterday, Combs said that Stephenson, 72, was too old for a third eight-year term. He also accused the incumbent of favoring the powerful over working people.

Lexington Herald Leader, May 25, 1988, Commission Exhibit 1F:

> Combs, 63, who last night challenged Stephenson to a televised debate, said he was pleased to survive the runoff, but disappointed he finished behind the incumbent.
>
> "We will correct that in the fall," Combs said.
>
> * * *
>
> Combs urged a debate on constitutional issues. He suggested that the League of Women Voters might arrange such a forum on Kentucky Educational Television.
>
> * * *
>
> "The thing is to try to get the people aware of what's going on," Combs said. "The people who are to apply their laws are not doing it in many cases. They're ignoring it or rewriting it or mending it, in many respects."

(2)

No. 90-1856

FILED
AUG 7 1991
OFFICE OF THE CLERK

In the
Supreme Court of the United States
October Term, 1990

R.J.C.R.,

Petitioner,

v.

J.C.J.D.,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

MEMORANDUM IN OPPOSITION

Frank E. Haddad, Jr.
(Counsel of Record)
George Salem, Jr.

Fifth Floor
Kentucky Home Life Bldg.
Louisville, Kentucky 40202
(502) 583-4881

Peter L. Ostermiller

Stallings & Stallings
Sixteenth Floor
Kentucky Home Life Bldg.
Louisville, Kentucky 40202
(502) 589-6130

August 7, 1991

QUESTIONS PRESENTED

1. Should the Court review questions involving the application of the First Amendment to invalidate a Canon of Judicial Conduct, which has since been amended, where the decision below rests not only on the First Amendment but also on independent state grounds?

2. Does the United States Constitution permit state judges to enact a rule that forbids candidates for their offices from stating views on any "disputed legal and political issues" that the voters may consider in deciding which judge to elect?

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In the

Supreme Court of the United States

October Term, 1990

No. 90-1856

R.J.C.R.,

Petitioner,

v.

J.C.D.,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

MEMORANDUM IN OPPOSITION

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Kentucky Constitution provides as follows:

Section 1. All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

* * *

Fourth: the right of freely communicating their thoughts and opinions.

> Section 8. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.
>
> Section 117. Justices of the Supreme Court and judges of the Court of Appeals, circuit and district court shall be elected from their respective districts or circuits on a nonpartisan basis as provided by law.

The First Amendment to the United States Constitution provides as follows, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . ..

Supreme Court Rule 4.300, which contains the Kentucky Code of Judicial Conduct, formerly contained the following language in Canon 7:

> B. Campaign Conduct.
>
> > (1) A candidate, including an incumbent judge for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election,
> >
> > > (c) should not . . . announce his views on disputed legal or political issues . . ..

As amended since the decision below, Canon 7 now provides as follows, in pertinent part:

> B. Campaign Conduct.
>
> > (1) A candidate, including an incumbent judge for a judicial office that is filled either by public election between competing candi-

dates or on the basis of a merit system election,

> (c) should not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . .

STATEMENT

This case involves statements made by respondent Justice Dan Jack Combs in his campaign for election to the Kentucky Supreme Court, the state's highest court. As a common law court, it is responsible for guiding the development of the common law of Kentucky. *E.g.*, *Hilen v. Hays*, 673 S.W.2d 713, 717 (Ky. 1984). It also has the final word in interpreting and applying the Kentucky constitution and statutes.

These powers effectively give the Justices of the Kentucky Supreme Court broad authority both to formulate and to change the law, and thus, as a practical matter, to decide major issues of Kentucky public policy. *See Gregory v. Ashcroft*, 111 S. Ct. 2395, 2403-2404 (1991). To assure that this power is used in a way that the people of Kentucky consider proper, the Kentucky Constitution guarantees the people the right to elect their judges, not only for the Supreme Court, but also for the intermediate appellate court and the trial courts. And, in electing judges to act as their "representatives" in making important government decisions, *cf. Chisom v. Roemer*, 111 S. Ct. 2354 (1991), it is not surprising that the voters are interested in learning about the political and legal positions of the candidates, in order to predict how they will respond when important issues come before the courts.

In 1988, respondent ran for election to the Supreme Court against a sitting incumbent. In his campaign, he publicly reiterated a number of legal conclusions that he had included in his majority and dissenting opinions as a judge on Kentucky's intermediate appellate court. For example, he expressed the belief that the Kentucky Constitution's protection of the right to bear arms extended to felons; that the Kentucky courts had improperly

limited the right to sue for personal injuries by the so-called "fireman's rule" which forbids suits by injured fire fighters against those whose negligence causes the fire; and that the courts should not apply a highly deferential standard in reviewing workers compensation appeals. He also stated that he considered individual rights to be more important than the interests of government bodies and private corporations, and he criticized his opponent for taking the opposite view. Respondent reserved his strongest criticism, however, for the Code of Judicial Conduct itself which, he said, was used by incumbent judges to insulate themselves from criticism and thus to preserve themselves in office by minimizing public understanding of their own conduct in office.

After respondent was elected, petitioner Judicial Retirement and Removal Commission initiated charges against him for having made these statements. The Commission ruled first that it lacked the power to decide whether the Kentucky or United States Constitutions forbade the application of the Code of Conduct to prohibit respondent's statements. Pet. App. 17a. Proceeding to the merits, the Commission found respondent guilty of violating Canon 7B(1)(c), which forbids candidates for judicial office from stating their views on disputed legal and political issues. *Id.* 18a, 20a. The Commission also ruled that he had violated Canons 1, 2, and 7B(1)(a), which require that judges promote public confidence in their integrity and impartiality, that they maintain the dignity appropriate to their office, and that they make no pledges or promises of conduct in office. According to the Commission, respondent's statements about his legal positions and his criticisms of the free speech restrictions in the Canons reduced public confidence in judicial integrity, were undignified, and constituted improper pledges. *Id.* 18a-22a. Accordingly, the Commission suspended respondent from his elected office for three months, without pay, a penalty that was stayed pending review by the Supreme Court. *Id.* 31a-32a.

The dissenting member of the Commission, Dr. Lewis Wesley, agreed that it would be inappropriate for the Commission to invalidate the Code of Judicial Conduct as unconstitutional, but he insisted that the Commission should apply the Code in a constitutional fashion. *Id.* 29a. In that regard, the dissenter argued that the constitutional right of the people to elect their judges carried with it the implicit right of the people to learn the

views of candidates for judicial office. *Id.* 25a. Indeed, he reasoned, "it is the responsibility of the judicial candidates to state their views on legal philosophy and to explain how those views differ from their opponents," and only by citing specific examples can a candidate meet this responsibility effectively. Otherwise, the public would be judging candidates solely by their personal appearances. *Id.* 26a. Dr. Wesley concluded that there was insufficient evidence of any violation of the Code except the contention that respondent had challenged his opponent to a public debate; on that issue, Dr. Wesley concluded that respondent should be admonished. *Id.* 27a.

Respondent then appealed to the Kentucky Supreme Court, all of whose members disqualified themselves, and were replaced by a special Supreme Court appointed by the Governor. Respondent argued both that he had not violated the Code of Judicial Conduct, and that the Canons that had been cited against him violated both the state and the federal constitutions. In that regard, he relied on the free speech clauses and the judicial election clause of the Kentucky Constitution, as well as the First Amendment and the Equal Protection Clause in the Fourteenth Amendment to the United States Constitution.

On February 14, 1991, the Kentucky Supreme Court unanimously reversed petitioner's decision, agreeing with Dr. Wesley that the Commission's findings of fact were clearly erroneous, and that its order was contrary to both state and federal law. Pet. App. 3a. The court agreed that respondent had been shown to have violated Canon 7B(1)(c) by announcing his views on disputed legal issues, but it rejected the conclusion that he had violated that Canon by making pledges of preferential treatment. Pet. App. 8a. The court further held that respondent had not violated Canons 1, 2, or 7B(1)(a) by failing to uphold the integrity of the judiciary, to promote the impartiality of the judiciary, or to maintain the dignity appropriate to judicial office. Pet. App. 9a. All of these charges, except the statement of views on disputed legal issues, were dismissed for lack of evidence.

Turning to respondents' statements regarding legal issues, the Kentucky Supreme Court held that both the Commission's order, and the portion of Canon 7 concerning statements on "disputed legal issues," violated the state and federal constitutions. The court ruled that the state and federal free speech clauses had

been violated because a citizen does not surrender all of his free speech rights by becoming a candidate for judicial office. Pet. App. 3a-4a. The court below also invoked Section 117 of the Kentucky Constitution, which provides for popular election of judges. The Canon forbidding discussion of issues is inconsistent with this clause, according to the court, because it

> strictly prohibits dialogue on virtually every issue that would be of interest to the voting public. . . . [A] judicial candidate's qualifications for the position . . . would include, among other things, knowledge of the law, and personal views and beliefs. Instead, we are encouraging the public to judge candidates for our judiciary by not much more than their personal appearances. We believe a well-informed electorate is essential to the democratic election process guaranteed by the Kentucky Constitution. The rights of the voting public to hear what a candidate has to say is a compelling one.
>
> Pet. App. 7a.

Moreover, the court reasoned, the ban on any statements concerning disputed legal or political issues is far broader than is necessary to accomplish the state's legitimate purposes. *Id.* Instead of barring all discussions of legal issues, the Canon might be revised to bar only "making statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." *Id.* 8a. The court noted that the American Bar Association had recently amended its Model Code of Judicial Conduct to substitute this narrower language for earlier language identical to the Kentucky Canon, and that the reason for this change was that the older language "was an overly broad restriction on speech." *Id.*, *quoting* Commentary on ABA Model Code (August 1990). Indeed, Special Justice Bertram, concurring, went on to recommend that the Supreme Court revise the Canon to make it consistent with the constitutions. *Id.* 10a.

By Order of April 4, 1991, the Kentucky Supreme Court accepted the recommendation of Special Justice Bertram and revised Canon 7B(1)(c), the only rule that was found to have been

violated. The Court struck the language barring any discussion of "disputed legal or political issues," and substituted the new language from the ABA Model Code that bars statements that "commit or appear to commit" the candidate on matters before the court.

REASONS FOR DENYING THE WRIT

A. The Decision Below Rests on Adequate and Independent State Grounds, and the Legal Issue Involved Is Unimportant Because Kentucky Has Modified Its Code to Eliminate the Language That Was Struck Down in This Case.

Even if the legal question in this case were worthy of review in a proper case, there are two reasons why this case does not present a proper vehicle for their consideration: *first*, the decision below rests on adequate and independent state grounds, and *second*, Kentucky has now amended the only state rule that respondent was found to have violated, so that, even though the case is technically not moot, the underlying controversy has lost most of its importance.

1. The petition purports to present two questions of federal constitutional law. The first question is the validity of Canon 7B(1) under the First Amendment, "on its face or as applied in this case"; the second question is whether Canons 1 and 2 may constitutionally be applied to respondent's campaign statements.

However, the second question is not before this Court, because the Kentucky Supreme Court held that there was insufficient evidence in the record to warrant the application of Canons 1 and 2 to respondent's campaign statements as a matter of state law. Only with respect to the portion of Canon 7B(1)(c) that pertains to statements on "disputed issues" did that Court find a violation that required a constitutional ruling. Thus, with respect to the alleged "pledge of preferential treatment," the court stated, "we could find no evidence to support the Commission's findings." Pet. App. 8a. With respect to alleged "pledges or promises of conduct in office," the court held, "we did not find that the statements . . . amounted to pledges or promises of conduct in office." *Id.* And with respect to Canons 1, 2 and 7B(1)(a), the court determined, "we can find no evidence that

violations of these Canons occurred.... To criticize the provisions of the Code and published court decisions does not in our view, in and of itself, undermine the public's confidence and respect for the judiciary." *Id.* 9a. Thus, although there is an intimation in the opinion below that, as applied to respondent's conduct, Canons 1 and 2 might also be inconsistent with the state and federal constitutions, *id.* 7a, the court never actually reached that question because it concluded that no violation of those Canons had been proved as a matter of state law.

With respect to Canon 7B(1)(c), the court below did find a violation, but its invalidation nevertheless rests on an adequate and independent ground that deprives this Court of jurisdiction. With respect to the free speech violation, the court below squarely rested its judgment on both of the two free speech clauses in the state constitution, Sections 1 and 8, as well as on the First Amendment. Even if this might not be sufficient to form an adequate and independent state ground, the court also relied on a state constitutional provision, Section 117, guaranteeing the popular election of judges, that has no parallel in the federal constitution. The Kentucky Supreme Court held that this constitutional guarantee encompasses the right of the people to learn the legal and political views of judicial candidates. Pet. App. 7a.

Whatever conclusion this Court might ultimately reach concerning the First Amendment, the judgment below would have to be affirmed because of the holdings of the court below about the Kentucky Constitution's effect on Canon 7B(1)(c) and about the lack of evidence to show a violation of Canons 1 and 2. These holdings, of course, cannot be reviewed in this Court, and hence the Court would be issuing a purely advisory opinion. Accordingly, this case is not a proper vehicle for resolving the federal constitutional questions that the petition seeks to present.

2. As the petition acknowledges, at 13, the Kentucky Supreme Court has now repealed the relevant language in Canon 7 that barred candidates from stating their views on disputed legal and political issues, and substituted new language, drawn from a similar change in the ABA Model Code, that forbids candidates from committing themselves concerning cases and issues likely to come before the court. We agree with petitioner that this change does not make the case moot, in the strict Article III sense of the term, because the validity of the punishment meted out to respon-

dent was based on the Canon as it stood at the time of his campaign statements. Nevertheless, the change affects the certworthiness of the case, because it makes clear that the reversal that petitioner solicits from this Court would govern no future case, but may only affect whether respondent may be punished for his statements. Indeed, the change, which was not compelled by the order of the special panel, strongly suggests that the Kentucky Supreme Court, which is responsible for deciding what rules should govern state judicial ethics, does not share petitioner's anxiety for a constitutional confrontation over the validity of the old language in Canon 7B(1)(c).

Moreover, in changing Kentucky's Canon, the court below was simply following the guidance of the ABA's Model Code, which was promulgated in August, 1990. Given the recent vintage of this change, and the practice of the States in looking to the ABA for guidance, it seems likely that other states will be changing their codes as well. Thus, insofar as the petition relies on the similarity between Kentucky's Canon and the canons in other states to support the contention that this case presents an important question that should be resolved immediately, this change also counsels waiting to see whether other states follow the lead of Kentucky and the ABA, rather than reaching out to address the constitutionality of a rule that may be obsolete.

In an effort to save its case, petitioner contends, at 13, that "in light of the stipulated record, . . . this case would [not] be significantly different constitutionally under the amended rule." The accuracy of this prediction is by no means clear, because it assumes that the rule against making commitments concerning future rulings on particular issues extends to forbid criticisms of past rulings on particular issues, such as respondent made in this case. That interpretive question should be decided by the Kentucky courts, in an actual controversy, before this Court reaches out to decide the constitutional validity of such a rule. Indeed, although the Commission's counsel is apparently confident that respondent's statements criticizing past judicial opinions constitute commitments to rule in a certain way on certain issues in the future, the court below apparently disagreed, because it rejected as clearly erroneous the Commission's finding that the statements "amounted to pledges or promises of conduct in office." Pet. App. 8a.

Accordingly, this case does not present a genuine case or controversy over the constitutionality of the new rule, or an appropriate vehicle for assessing the constitutionality of the superseded rule.

B. The Decision Below Accords With the General Trend Concerning Permissible Statements in Judicial Elections, and There Are No Broad Conflicts, Among the Lower Federal and State Courts, Whose Resolution is Required.

Even if the Court concludes that the constitutional validity of the rule against statements about "disputed legal or political issues" is squarely presented here, there is no broad conflict over that issue among the lower courts. To the extent that the issue has been litigated at all, the decision below is in accord with both of the trial courts that have decided the issue.

Petitioner cites only two decisions as presenting the conflict that warrants a grant of certiorari: *Berger v. Supreme Court of Ohio*, 598 F. Supp. 69 (S.D. Ohio 1984), and *In re Kaiser*, 111 Wash. 275, 759 P.2d 392 (1988). *Berger*, however, involved a judicial candidate who wanted to make statements criticizing certain aspects of judicial administration, such as the failure to use alternative dispute resolution procedures; the case did not involve general speech on legal or political issues. The district court construed the canon to permit statements about procedural questions in order to avoid constitutional issues, and then proceeded to deny a preliminary injunction against the canon as thus construed. And *In re Kaiser*, 111 Wash. 275, 759 P.2d 392 (1988), rejected an "as applied" attack on the portion of Canon 7B(1) that forbids judges from making "'pledges or promises' of partiality," 759 P.2d at 395, 400 -- a part of the Canon that was held in this case not to have been violated as a factual matter -- while also holding that the candidate's criticism of the incumbent was constitutionally protected. *Id.* at 397-399.

The other cases that petitioner cites are of no more help. In *Morial v. Judiciary Comm. of Louisiana*, 565 F.2d 295 (5th Cir. 1977), the issue was not Canon 7B(1)(c), but rather a statute forbidding sitting judges from running for political office. Similarly, although *In re Seraphim*, 97 Wis. 485, 294 N.W.2d 485 (1980), contains some general dictum that not all speech by judges is

constitutionally protected, the case did not involve the Canon on campaigning; in fact, the speech for which constitutional protection was claimed in *Seraphim* involved off-the-bench sexual advances and intemperate, on-the-bench berating of lawyers, witnesses and defendants. Finally, *In re Baker*, 218 Kan. 209, 549 P.2d 701 (1975), only upheld discipline for false statements about the incumbent.

On the other hand, the petition ignores the only two district court decisions that did squarely confront the validity of the bar on statements about legal issues, both of which struck down rules identical to the one at issue here. In *ACLU v. Florida Bar*, 744 F. Supp. 1094 (N.D. Fla. 1990), the court invalidated a broad proscription of statements about legal or political issues, while conceding -- in agreement with the Kentucky Supreme Court here -- that a state could properly sanction statements "which might be construed as particularized pledges of conduct." *Id.* at 1098. Similarly, in *Stretton v. Disciplinary Board*, 763 F. Supp. 128 (E.D. Pa. 1991), *appeal pending*, the court struck down the ban on statements about "disputed legal or political issues," while referring with apparent approval -- again in agreement with the court below -- to the revised ABA Model Code that replaced the challenged language with a rule against "making statements that commit or appear to commit the candidate" on impending cases or issues. *Id.* at 138. Thus, to the extent that the issue here has been litigated, the decision below is in accord with the consensus view of the lower courts, and no intervention by this Court is required to resolve a conflict.

Nor does petitioner demonstrate that the decision below conflicts with previous decisions of this Court. In that regard, the petition vaguely cites as "analogous" two cases that upheld statutory limitations on the free speech rights of civil servants, Pet. 12, while ignoring the numerous decisions cited by the court below, and discussed in the Florida and Pennsylvania cases, that apply the strictest of tests to state rules that purport to limit the right to speak on behalf of one's own candidacy in an election. Neither of the decisions cited by petitioner discusses the question of how the public can make an informed choice about which candidate to elect if the candidates are forbidden from discussing any of the real issues in the election. And neither case involved a rule, enacted by incumbent judges, that limited the ability of

other judges to criticize the incumbents' decisions in appealing to the voters to change the holders of judicial offices.

Even in the Court's most recent foray into the conflict between professional ethical rules and free speech, four members of the Court would have applied a strict standard to rules that forbade a lawyer from criticizing the administration of justice, even in a pending case, *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2732-2736 (1991). The remaining Justices agreed that, whatever rules were permissible with respect to the duties of a lawyer pertaining to a proceeding that is currently pending in court, a different standard might apply "to other lawyers." *Id.*, 111 S. Ct. at 2744 n.5. The Court also deemed it significant whether the case posed a direct challenge to a Model Rule of the ABA, with five Justices emphasizing that a direct challenge to a national standard was involved, *id.* at 2741-2742 and n.4, and the other Justices relying on their conclusion that only a unique Nevada variant was at stake. *Id.* at 2725-2726. The ABA's Model Code of Judicial Conduct is of course not at stake in this case, inasmuch as it was amended last year precisely because of the free speech problems posed by a blanket ban on discussion of legal and political issues, as the Kentucky Canon formerly provided.

The pre-amendment Canon, taken literally as petitioner seems to do, would forbid judges even from writing law review articles, speaking at law schools and bar meetings about the law, or sending messages to the legislature about the State of the Judiciary, not to speak of discussing the issues that the voters are entitled to consider in deciding which candidate can best serve them. Although a number of state judicial disciplinary commission decisions address such issues, the state and federal courts have only begun to grapple with them, even in a non-constitutional context. *See generally* Shaman, Lubet & Alfini, *Judicial Conduct and Ethics* § 11.08 (1990). And, of the lower court decisions that may be found addressing the specific question here, both are in accord with the decision of the Kentucky Supreme Court. Thus, even if the Court considers the question to be one that warrants review, and even if the Court considers that it has jurisdiction because there is no independent state ground, it should wait for a case that presents the constitutionality of the rule against statements on disputed legal and political issues cleanly, as this case fails to do.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Frank E. Haddad, Jr.
(Counsel of Record)
George Salem, Jr.

Fifth Floor
Kentucky Home Life Bldg.
Louisville, Kentucky 40202
(502) 583-4881

Peter L. Ostermiller

Stallings & Stallings
Sixteenth Floor
Kentucky Home Life Bldg.
Louisville, Kentucky 40202
(502) 589-6130

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No. 90-1856

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JUDICIAL RETIREMENT & REMOVAL COMMISSION OF KENTUCKY - - - Petitioner

versus

DAN JACK COMBS, JUSTICE OF THE SUPREME COURT OF KENTUCKY - Respondent

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

REPLY TO MEMORANDUM IN OPPOSITION

GEORGE F. RABE
Counsel of Record
1004 First National Building
Main & Upper Streets
Lexington, Kentucky 40507-1708
(606) 255-2313

JAMES D. LAWSON
Executive Secretary
Judicial Retirement and Removal Commission
P.O. Box 21868
Lexington, Kentucky 40522-1868
(606) 269-1476

Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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No. 90-1856

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DAN JACK COMBS, JUSTICE OF THE SUPREME COURT OF KENTUCKY* - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

REPLY TO MEMORANDUM IN OPPOSITION

Purpose of this Brief

This reply brief is filed pursuant to Rule 15.6 of the rules of this Court to address the argument first raised in the memorandum in opposition that the decision below rests on adequate and independent state grounds.

The Kentucky Decision Is Based On the First Amendment to the United States Constitution; It Is Clear from the Opinion That the Case Does Not Rest Upon Adeqate and Independent State Grounds.

The guaranty of free speech under the First Amendment to the United States Constitution was the dominant

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*On the basis of information from the Clerk of this Court, we are using the true names of the parties in the caption as the matter is no longer confidential.

issue throughout Kentucky proceedings. Petition, p. 7. The Commission's first conclusions of law were on the constitutional issue. The Commission stated it does not have the authority to rule on the constitutionality of the rules but went further and stated, Petition Appendix, 17a, 18a:

> However, it should be noted that all but one member of the Commission would reject Justice Comb's constitutional arguments and find that the Code of Judicial Conduct, on its face and as applied to the facts in this case, is constitutional.

At the beginning of its legal analysis, the Kentucky Supreme Court stated, Petition Appendix 3a:

> *Based upon the controlling case law* and for the reasons cited herein, the Court hereby holds that the Findings and Order of the Commission relating to Counts, I, III, IV, V, VI, and VII, are clearly erroneous, and further, are in contravention of state and federal law.
>
> *The United States Constitution guarantees the right of an individual to free speech.* Accordingly, Congress can make no law abridging the freedom of speech. First Amendment, U.S. Constitution. *Similarly,* Section Eight of the Kentucky Constitution provides that "(e)very person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty." (Emphasis added.)

The "controlling case law" upon which the court below based its decision consisted of seven decisions of this Court, a decision of the United States Court of Appeals for the Fifth Circuit, and a decision of the United States District Court for the Northern District of Florida, all dealing with the right of free speech under the United States

Constitution. Petition Appendix 4a, 6a, 7a, 9a. Not a single Kentucky case was cited in the opinion of the court below, and in fact, no decision of any court was cited in the court's opinion except for the nine federal free speech cases.

There is no suggestion that the court below considered the Kentucky guaranty of free speech to be any broader than the federal guaranty discussed in the nine cases cited by the court as "controlling case law." The court also referred to the Kentucky constitutional provision for selection of judges by nonpartisan popular election, Petition Appendix 7a, but it is clear from the context that the reference was merely a basis for application of the First Amendment guaranty of free speech.

The court below stated that "The focus of the allegations against Justice Combs centers on Canon 7 (B)(1) of the Code." Petition Appendix 5a. It noted in part regarding Justice Combs' contention that, Petition Appendix 6a:

> Justice Combs asserts that to restrict his political speech from *all* "disputed legal or political issues" unconstitutionality deprives him of free speech without a compelling state interest. (Emphasis the court's.)

The court ruled, Id.:

> However, SCR 4.300 Canon 7(B)(1)(c) is not so narowly drawn as to limit a candidate's speech to such specific prohibitions. Instead, the section prohibits *all* discussion of a judicial candidate's views on disputed legal or political issues, and thus unnecessarily violates fundamental state and federal constitutional free speech rights of judicial candidates. (Emphasis the court's.)

It also stated, Petition Appendix 7a, 8a:

> Moreover, we are not persuaded by the Commission's argument that the language of Canon 7(B)(1)(c) prohibiting all discussion of "disputed legal issues" by judicial candidates is necessary to prevent campaign statements which may indicate a predisposition or bias in favor of one litigant over another.

Following these conclusions, the court below said it found no evidence to suport the Commission's finding that the campaign advertisements reached the level of making a pledge of preferential treatment to one class of persons over another and did not find that Justice Combs' statement amounted to pledges or promises of conduct in office. Petition Appendix 8 a. In rejecting the Commission's determination that Justice Combs' campaign conduct violated three other canons, Canons 1 and 2 and 7 (B)(1)(a), the court stated, Petition Appendix 9a:

> *The basis* for these Findings *again centers on speech* which falls within constitutional protections. We can find no evidence that violations of these Canons occurred, *especially when viewed in the context of Justice Combs, right to free speech.* (Emphasis added.)

All of the statements of Justic Combs involved in this case were stipulated to have been made. There was no factual issue. The issue was essentially whether those statements could be punished under the Canons of the Code of Judicial Conduct consistently with the First Amendment's guaranty of the right of free speech.

This Court addressed the subject of adequate and independent state gounds at length in *Michigan* v. *Long,* 463 U.S. 1032, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983). The following points of discussion from that case are directly relevant here.

Quoting from another case, 463 U.S. at 1039:

"[e]ven if the case admitted of more doubt as to whether federal and state grounds for decision were intermixed, the fact that the state court relied to the extent it did on federal grounds requires is to reach the merits."

* * *

[O]utright dismissal of cases is clearly not a panacea because it cannot be doubted that there is an important need for uniformity in federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the *independence* of an alleged state ground is not apparent from the four corners of the opinion. We have long recognized that dismissal is inappropriate "where there is strong indication . . . that the federal constitution as judicially construed controlled the decision below." 463 U.S. at 1040. (Emphasis the Court's.)

* * *

[W]hen as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on

bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision. 463 U.S. at 1040, 1041.

* * *

Our requirement of a "plain statement" that a decision rests upon adequate and independent state grounds does not in any way authorize the rendering of advisory opinions. Rather, in determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, (citation omitted) we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law. 463 U.S. at 1042.

* * *

In these [two cited] cases, the state courts relied on both state and federal law. We determined that we had jurisdiction to decide the cases because our reading of the opinions led us to conclude that each court "felt compelled by what is understood to be federal constitutional considerations to construe and apply its own law in the manner it did." 463 U.S. at 1042, n.8.

* * *

Our review of the decision below under this framework leaves us unconvinced that it rests upon an independent state ground. Apart from its two citations of the State Constitution, the court below relied *exclusively* on its understanding of Terry and other federal cases. Not a single state case was cited to support the state court's holding that the search of the passenger compartment was unconstitutional. . . . The references to the State Constitution in no way indicate that the decision below rested on grounds in any

way *independent* from the state court's interpretation of federal law. Even if we accept that the Michigan Constitution has been interpreted to provide independent protection for certain rights also secured under the Fourt Amendment, it fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law. 463 U.S. at 1043.

CONCLUSION

The court below expressly decided this case on the basis of "controlling case law" consisting exclusively of federal cases on the right of free speech under the United States Constitution. The Petition should not be denied on the basis of adequate and independent state grounds.

Respectfully submitted,

GEORGE F. RABE
Counsel of Record
1004 First National Building
Main & Upper Streets
Lexington, Kentucky 40507-1708
(606) 255-2313

JAMES D. LAWSON
Executive Secretary
Judicial Retirement and Removal Commission
P.O. Box 21868
Lexington, Kentucky 40522-1868
(606) 269-1476

Counsel for Petitioner

(4)

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

SUPPLEMENTAL BRIEF FOR PETITIONER

GEORGE F. RABE
Counsel of Record
1004 First National Building
Main & Upper Streets
Lexington, Kentucky 40507-1708
(606) 255-2313

JAMES D. LAWSON
Executive Secretary
Judicial Retirement and Removal Commission
P.O. Box 21868
Lexington, Kentucky 40522-1868
(606) 269-1476

Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

SUPPLEMENTAL BRIEF FOR PETITIONER

This supplemental brief is filed pursuant to Rule 15.7 of the rules of this Court to call the attention of the Court to a new case not available at the time of petitioner's last filing.

On September 9, 1991, the United States Court of Appeals for the Third Circuit decided the case of *Stretton* v. *Disciplinary Board of the Supreme Court of Pennsylvania*, Nos. 91-1398 & 91-1439 (3rd Cir. September 9, 1991). In that case, the court rejected a First Amendment attack on Canon 7(B)(1)(c) of Pennsylvania's Code of Judicial Conduct which read identically in pertinent part to Kentucky's Canon 7 (B)(1)(c) involved in this case. *Stretton,* slip opinion, pp. 9, 15-17. The court found the opinion of the Supreme Court of Kentucky in this case unpersuasive. *Id.*, p. 15. The Third Circuit's *Stretton* decision reversed the

district court's denial of enforcement of Pennsylvania's Canon reported in *Stretton* v. *Disciplinary Board of the Supreme Court of Pennsylvania,* 763 F.Supp. 128 (E.D. Pa. 1991), which was cited on p. 11 of the respondent's Memorandum in Opposition with appropriate notation that the appeal was pending. The Third Circuit's opinion in *Stretton* is cited as a case of a United States court of appeals which conflicts with Kentucky's decision under review.

Respectfully submitted,

GEORGE F. RABE
Counsel of Record
1004 First National Building
Main & Upper Streets
Lexington, Kentucky 40507-1708
(606) 255-2313

JAMES D. LAWSON
Executive Secretary
Judicial Retirement and Removal Commission
P.O. Box 21868
Lexington, Kentucky 40522-1868
(606) 269-1476

Counsel for Petitioner

September 20, 1991